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NO. 89-1280

In the Supreme Court of the United States

October Term, 1989

SOCORRO GUERRA, PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY FOR THE UNITED STATES IN OPPOSITION

SOCORRO GUERRA
IN PERSONA
REG. NO. 19220-004
P.M.B. 7007
UNIT: SHAWNEE
MARIANNA, FLORIDA 32446

BEST AVAILABLE COPY

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SOCORRO GUERRA
IN PERSONA
REG. NO. 1922-044
P.M.B. 7007
UNIT: SHAWNEE
MARIANNA, FLORIDA 32446

QUESTION PRESENTED

Whether Due Process requires the recusal of a Judge where there is a likelihood or probability for bias, resulting from information learned in his judicial capacity in ex parte communication that threats against his life have been made by the defendant, and where Judge's findings of fact demonstrate an absence of judicial detachment.

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OPINIONS BELOW

The opinion of the court of appeals (App. B) . unpublished, but the decision is noted at 891 F 906 (table). The opinion of the district court (A . A) is unreported.

JURISDICTION

The judgment of the court of appeals was ent d on November 13, 1989. The petition for a writ of rtiora was filed on January 11, 1990. The jurisdicti of thi Court is invoked under 28 U.S.C. 1254(1).

ARGUMENT

Under both §144 and §455, the alleged bias or prejudice must be personal and it must stem from extrajudicial source which would result in an opinion on the merits of some basis other than what the judge learned from his participation in the case.[1] The statutes legislative history legion in its holding,[2] and mandatory.[3]

---

1 Section §455(a) provides: a judge must disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." Section §455(b)(1), a judge must also disqualify himself where he has a "personal bias or prejudice concerning a party." If the evidence shows that a "reasonable person" would harbor doubts about the judge's impartiality", the trial judge must disqualify himself. Potashnick v. Port City Constr. Co., 609 F2d 1101, 1111 (5th Cir.), cert. denied, 449 US 820 (1980).

2 28 U.S.C. §455 (1970) provides: Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein. 28 U.S.C. §455 (1964) & (1946)

3 A straight-forward reading of the statute suggests that at the time a judge is made aware of a disqualifying interest, he falls squarely into the mandatory directives of Section §455(b). Read this way, it appears that the lack of any specific mention in §455(b) of divestiture is relevant, since at that point the judge knows that he "has" an interest, the section directs the judge to step down. With respect to Section §455(b) disqualification, Congress's unequivocal language means that parties cannot waive disqualification. Section §455(b) serves to protect the "appearance" and "propriety" of the judical system. (1974).

In considering whether to hear a case where there is a possibility of judicial bias, the court should err on the side of recusal. Potanshnick v. Port City Construction Co., 609 F2d 1101, 111 (5th Cir.), cert. denied, 449 US 820 (1980).

Here as in Potashnick the judge's failure to disqualify himself constituted an abuse of sound judicial discretion; and reversal is warranted by failure to disqualify and improper rule does not apply to exonerate action. The goal of judicial disqualification statute is to foster "appearance of impartiality". Alleged bias and prejudice of a judge to be disqualifying must stem from an extra-judicial source and must result in opinion on merits on some basis other than what the judge learned within judicial capacity. However, establishment of the extra-judicial source of bias and prejuidce of judge is not required in order to disqualify a judge. A time limit has never been applied to a claim of personal and extra-judicial bias under §455(b).[4] Here both are met.

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[4] Davis v. Board of School of Comm'rs, 517 F2d 1044, 1051 (5th Cir. 1975), cert. denied, 425 US 944 (1976); see also United States v. Conforte, 624 F2d 869, 880 (9th Cir.) (statute is self-enforcing and duty to disqualify in on judge), cert. denied, 449 US 1012 (1980); SCA Services, Inc. v. Morgan, 557 F2d 110, 117 (7th Cir.) ("The provision of [§455] mandatory, they are addressed to the judge and require that he disqualify himself in certain circumstances."); Wolfson v. Palmieri, 396 F2d 121 (2nd Cir.)(1968) ("If there be a real doubt created as to prejudice of judge, that alone may be important factor to be considered by judge in determining whether he should withdraw").

Here there is reason to believe the "appearance of impartiality" that Judge Scott was prejudiced against the petitioner by the extrajudicial and personal communication with the F.B.I., U.S. Marshals, and United States Attorney's Office with placing Judge Scott under 24-hour security for an unknown duration. Disclosure to petitioner's counsel of the nature of an in-chambers conference with all others "of counsel" was to be favored especially when the conference involved a matter directly concerning petitioner. Soccorro was stigmatized by private testimony unconstrained by the rules of evidence and untempered by cross-examination. If not ineradicable from the judge's mind, this created, at least, a situation in which the judge's impartiality might reasonably be questioned.

The facts of this case as in Potanshnick presented a question of the "appearance of impartiality" to be convincing a reasonable man that a bias or prejudice existed of a personal nature as opposed to judicial. Hence review is limited to sufficiency and compliance with the statute and Due Process. In re Murchison, 349 US 133, 138 (1955); Withrow v. Larkin, 421 US 35, Dyas v.Lockhart, 705 F2d 993, (8th Cir.) cert. denied, 104 S.Ct. 424 (1983); Offutt v. United States, 348 US 11 (1954); Tumey v. Ohio, 273 US 510 (1927); Berger v. United States, 41 US 230 (1921); United States v. Grinnell Corp., 384 US 563 (1966); Liljeberg v. Health Services Aquisition Corp., 486 US 847 (1988); Gibson v. Berryhill, 411 US 488; Taylor v. Hayes, 418 US 57; United States v. Thomas, 299 F.Supp. 494 (E.D.Mo. 1968); Morris v. Lewis, 54 F2d 1022 (4th Cir.), cert. denied, 52 S.Ct. 640 (1932);

Davis v. Board of School Comm'rs of Mobile City, 517 F2d 1044 (5th Cir.)(1975); Reserve Mining Co. v. Lord, 529 F2d 181 (8th Cir.)(1976); Wolfson v. Palmieri, 396 F2d 121 (2nd Cir.)(1968); Marshall v. Jerrico, 446 US 238 (1982); Fed.R. Crim.P. 52(b); United States Constitution Amendment 5; 1974 U.S. Code Cong., & Admin. News, p. 6351, 6357; Advisory Committee on Judicial Activities, Advisory Opinion No. 58 (1978); Subcommittee on Improvements in Judiciary Machinery of the Senate Committee on the Judiciary, 93d Cong., 1st (July 1971 - May 1973) at 95; 13A C. Wright, A. Miller & Cooper, Federal Practice and Procedures §3541 (2d ed. 1984); Note, Disqualification of Judges & Justices in the Federal Courts, 86 Harv.L.Rev. 736 (1973); 28 U.S.C. §144 and §455; Potashnick v. Port City Const. Co., 609 F2d 1101 (5th Cir.) cert. denied, 425 US 944 (1976); Jaffee v. Grant, 793 F2d 1182.

The standard for judicial disqualification is whether a reasonable person, knowing all the circumstances, and "under a realistic appraisal of psychological tendencies and human weaknesses would harbor doubt about the judge's impartiality." Public respect for the legal system, as Congress and this Court have recognized, depends not only on doing justice, but also on demonstrating that the system operates fairly. In re Murchinson (quoting Offutt v. United States 348 US 11 (1954) in part:

> [Our] stringest rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice".

The government's premise that the burden in upon the petitioner to demonstrate "cause and actual prejudice," rather than "plain error" of Rule 52(b) standard of review on a motion for collateral relief under 28 U.S.C. §2255 is ill-placed. This fails to be a case where the error was during a jury trial or a procedural default (challenge to jury instructions). Nor is it a case where the knowledge provided under "full disclosure" with all parites present in open court, including the witnesses and the petitioner. In Frady the judge was not the decision-making tribunal, but rather a jury. In Frady the defendant was present in open court privy to the information and afforded cross-examination of all the witntesses. In addition Frady warrants disregard to the fact-specific claim due to the information was learned during judicial capacity. United States v. Frady, 456 US 152 (1982)(emphasis added).

Here litigants were deprived of the entitlement to a judge whose unconscious responses in litigation that may be struck only in observing presence of all parties and their counsel and that right was impaired when party is required to meet in his opponent ad advocate who has already acted as judge's counsel in same litigation.

Petitioner contends that Judge Scott had a connection and relationship ex parte with the "counsel for the government" to the action. It is asserted, that his receiving counseling and extrajudicial information, who were presented by the U.S. Attorney's Office with the working relationship with the other governmental agengies, amounted to his being "counseled", or at least his having a relationship to or connection with attorneys

for the opposition's parties within the meaning of the statute. Thereby Judge Scott did sit in a "case" in which has had a relationship with "counsel" and/or in which he had a "substantial interest", within the congressional standards for mandatory disqualification.

This Court held that due process clause prohibits a criminal trial in which the judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant] in his case." Tumey v. Ohio, supra, In re Murchison, supra, United States v. Grinnell Corp., supra.

Here as in Reserve Mining Co. v. Lord, 529 F2d 181 (1976) the case demonstrates serious problems. The lower court's opinion demonstrates unsupported overt acts reflecting the "appearance" of bias against the defendant. In Reserve Mining Co. v. Lord the judge announced on the record that witnesses called by Reserve could not be believed, "that in every instance Reserve Mining Company hid the evidence, misrepresented, delayed and frustrated the ultimate conclusion". Id. In the instant case the judge's opinion was not announced on the record but rather in its written opinion after the conclusion with a higher degree of egregious remarks. (see App. "A"). Where the court has been a participate in ex parte communications that tend to exacerbate the culpability of the defendant or bear credibility to the defendant, the court should refer the case to another judge in order to assure the appearance, as well as the reality of fairness. Again, the instant case as in Reserve Mining Co. v. Lord, supra, the opinion rife with credibility determinations and findings of disputed facts not supported by record but by the extrajudicial knowledge

by beginning and ending with personal opinion as to Guerra's dangerousness, credibility, and character. Judge Scott thus became lawyer, witness and judge in the same proceeding, and abandons the greatest virtue of a fair and conscientious judge - impartiality. Here the tribunal had shed its robe of the judge and has assumed the mantle of the advocate.

"[T]ribunals of the country shall not only be impartial in the controversies submitted them but shall give assurance that they are impartial." The instant case is a situation in which the judge's impartiality might reasonably be questioned. Potashnick v. Port City Const. Co., 609 F2d 1101 (5th Cir.) cert. denied,449 US 820 (1980); 28 U.S.C. §144 and §455; U.S. Const. Amend. 5.

The government failed to submit any statute or case law in support that disqualification is not mandatory when the information was learned by extrajudicial sources. The case law submitted deal with knowledge learned in judicial capacity; and where the "full disclosure" was afforded, jury trials and as such as inapposite.

Here in direct contrast to the cases submitted by government, Judge Scott stated that be had been briefed on extrajudicial information directly bearing on the defendant (R.I. 339 p. 2) and failed to disclose to the parties the details of that briefing. The briefing was extrajudicial as opposed to knowledge obtained through judicial capacity. The government's contentions are without merit. United States v. DiPasquale, 864 F2d 271 (3rd Cir. 1988); Delesdernier v. Porterie, 666 F2d 116 (5th Cir.) cert. denied, 459 US 839 (1982); United States v. Frady, 456 US 152 (1982); United States v. Bond, 847

F2d 1233 (7th Cir.) (1988); United States v. Page, 828 F2d 1476 (10th Cir.) cert. denied, 484 US 989 (1987)1 Ogalala Sioux Tribe v. Homestake Mining Co., 722 F2d 1407 (8th Cir.)(1983); Phillips v. Amoco Oil Co., 799 F2d 1464 (11th Cir.)(1986) cert. denied, 481 US 1016 (1987).

Upon the opposition of the government during one of the writ of habeas corpus hearings, the petitioner's learned for the first time, that the allegation that an alleged Colombian "hit teams" planned to break into the courtroom without regard for the lives or safety of any person who may be present, including the presiding judge, was basis for the cancellation of the writ ad testificandum. Guerra's counsel requested an evidentiary hearing to be conducted on this issue to permit her to confront and cross-examine the parties for the government who purported these allegations, but her request was denied. (R.I. 340, 348) (R.I. 339 g. 4).

The instant case fails to fall within circumstances submitted by the government where the defendant had benefit of full disclosure of information learned within a judicial capacity; or where the extent of the impropriety were known placing it outside the boundaries of exceptional circumstances and subject to waiver. As such the cases are immaterial to the instant case. Ogalala Sioux Tribe v. Homestake Mining Co., supra, Phillips v. Amoco Oil Co., supra, United States v. Bond, supra, United States v. Page, United States v. Nobel, United States v. Giorgio, 840 F2d 1022 (1st Cir.)(1988); United States v. Frady, supra.

Applicable in a case which involves extrajudicial res judicata the determining factor was not whether the issue in question was litigated, but whether there was an opportunity to litigate the matter. Jaffe v. Grant, 793 F2d 1182 (11th Cir. 1986). Thus, a motion for recusal may not ordinarily be predicated upon the judge's ruling in the same or a related case. 28 U.S.C. §144 and §455; U.S. Const. Amend. 5.

The disqualification results from extrajudicial conduct rather than from a matter arising in a judicial context. The lack of "appearance" of impartiality is of the record in the opinion of the lower court stemming from the extra-judicial evidence received through ex parte methods is demonstrated by the absence of judicial attachment. Focus under the statute, which provides for disqualification of judge if his impartiality might reasonably be questioned, is on the objective appearance of bias, rather than bias-in-fact. 28 U.S.C. §455(a)

Facts which support disqualification were not discovered until after the post-conviction hearing had been concluded. Potashnick v. Port City Const. Co., 609 F2d 1101, 1108-15, (5th Cir.) cert. denied, 425 US 944 (1976).

In Potashnick, it was noted that §455 makes it the judge's duty to disqualify himself as soon as he is aware grounds exist. The mandate is made inexorable by express prohibition against waiver. The statute applies whenever the judge "acts as a lawyer" within the meaning of §455(b)(5)(ii) when he actually participated in the case. Here the evidence is of record that Judge Scott had participated in discovery by ex parte. Such participation, therefore, required recusal. Because disqualifcation cannot be waived, the issue is solely one of law.

The waiver section of §455 provides: "no . . judge . .shall accept from the parties to the proceedings a waiver on any grounds for disqualifcation enumerated in subsection (b). The provision is mandatory. They impose no duty on the parties to seek disqualification nor do they contain any time limits within disqualification must be sought. Moreover, although the Department of Justice recommended that the new section §455 should include some limitation of time "to prevent applications for disqualification from being near the end of a trial when the underlying facts were known long before." H.R.Rep. No. 1435, 93d Cong., 2d Sess 9 (1974) U.S. Code Cong. & Admin. News, 1974, p. 6358. Congress did not incorporate this recommendation in the statute. Because it is obvioius that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of the statute, the government's defenses to the petition are without merit. Davis v. Board of School Comm'rs of Mobile City, supra; U.S. Const. Amend. 5; 28 U.S.C. §144 and §455; Tumey v. Ohio, In re Murchison, supra, Marshall v. Jerrico, supra.

Here as in Potashnick, the ground was not discovered until the case concluded. There the court held that waiver was not possible since there had been no full and fair disclosure. Postashnick v. Port City Const. Co., supra.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

May 10, 1990

Jacopo Guerra